

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

GRAIN BELT EXPRESS CLEAN LINE LLC)	
)	
)	
Application for an Order granting Grain Belt)	
Express Clean Line LLC a Certificate of Public)	
Convenience and Necessity pursuant to)	Docket No. 15-0277
Section 8-406.1 of the Public Utilities Act to)	
Construct, Operate and Maintain a High Voltage)	
Electric Service Transmission Line and To)	
Conduct a Transmission Public Utility Business)	
In Connection Therewith and Authorizing Grain)	
Belt Express Clean Line Pursuant to Sections)	
8-503 and 8-406.1(i) of the Public Utilities Act)	
To Construct the High Voltage Electric)	
Transmission Line.)	

**STAFF OF THE ILLINOIS COMMERCE COMMISSION
RESPONSE TO MOTIONS TO DISMISS**

NOW COMES the Staff of the Illinois Commerce Commission (“Staff”) by and through its undersigned counsel, pursuant to 83 Ill. Admin. Code § 200.190(e) and the May 19, 2015, Notice of Administrative Law Judge’s (“ALJ”) Ruling, and hereby responds to the separate Motions to Dismiss filed by the Illinois Agricultural Association a/k/a the Illinois Farm Bureau (“Farm Bureau”), Concerned Citizens & Property Owners (“CCPO”), and Landowners Alliance of Central Illinois, NFP (“LACI”) filed on May 18, 2015, and by Rex Encore Farms LLC and Rex Encore Properties LLC (collectively, “Rex Encore”) filed on May 20, 2015 in the above-captioned docket.

I. Background

On April 10, 2015, Grain Belt Express Clean Line LLC (“Grain Belt,” “Company” or “Applicant”) filed a Verified Application to the Commission for an order (1) granting Grain Belt a Certificate of Public Convenience and Necessity (“Certificate” or “CPCN”) pursuant to §8-406.1 of the Public Utilities Act (“PUA”), 220 ILCS 5/8-406.1, to construct, operate and maintain a high voltage electric transmission line and related facilities and to operate a transmission public utility business in connection therewith; (2) authorizing Grain Belt, pursuant to §8-503 and §8-406.1(i) to construct the high voltage electric transmission line and related facilities; and (3) granting Grain Belt certain other relief in connection with operations (“Application”). The proposed project originates in Ford County Kansas, and traverses Kansas and northern Missouri for 300 miles; it would enter Illinois approximately 6.5 miles west of New Canton, Illinois, in Pike County, traversing Illinois for approximately 202.7 miles to a location near West Union Clark County, Illinois, where a direct current (“DC”)-to-alternating current (“AC”) converter station will be located, and extend an additional 3.6 miles to the Illinois-Indiana border, where it will continue in Indiana to the AEP 345 kV transmission system.

The following parties have filed Motions to Intervene or entered appearances in this matter: the Farm Bureau, CCPO, LACI, Rex Encore, Ameren Illinois Company d/b/a Ameren Illinois, Mary Ellen Zotos, Rockies Express Pipeline, John Barry Julian and the Illinois Central Railroad Company.

II. Legal Standards

Section 8-406.1

Sec. 8-406.1. Certificate of public convenience and necessity; expedited procedure (in pertinent part) states:

(a) A public utility may apply for a certificate of public convenience and necessity pursuant to this Section for the construction of any new high voltage electric service line and related facilities (Project). . .

(f) The Commission shall, after notice and hearing, grant a certificate of public convenience and necessity filed in accordance with the requirements of this Section if, based upon the application filed with the Commission and the evidentiary record, it finds the Project will promote the public convenience and necessity and that all of the following criteria are satisfied:

(1) That the Project is necessary to provide adequate, reliable, and efficient service to the public utility's customers and is the least-cost means of satisfying the service needs of the public utility's customers or that the Project will promote the development of an effectively competitive electricity market that operates efficiently, is equitable to all customers, and is the least cost means of satisfying those objectives.

(2) That the public utility is capable of efficiently managing and supervising the construction process and has taken sufficient action to ensure adequate and efficient construction and supervision of the construction.

(3) That the public utility is capable of financing the proposed construction without significant adverse financial consequences for the utility or its customers.

(g) The Commission shall issue its decision with findings of fact and conclusions of law granting or denying the application no later than 150 days after the application is filed. The Commission may extend the 150-day deadline upon notice by an additional 75 days if, on or before the 30th day after the filing of the application, the Commission finds that good cause exists to extend the 150-day period. . .

(i) Notwithstanding any other provisions of this Act, a decision granting a certificate under this Section shall include an order pursuant to Section 8-503 of this Act authorizing or directing the construction of the high voltage electric service line and related facilities as approved by the Commission, in the manner and within the time specified in said order.

220 ILCS 5/8-406.1 (emphasis added).

Section 3-105

Sec. 3-105. Public utility (in pertinent part) states:

(a) "Public utility" means and includes, except where otherwise expressly provided in this Section, every corporation, company, limited liability company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever that owns, controls, operates or manages, within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with, or owns or controls any franchise, license, permit or right to engage in:

(1) the production, storage, transmission, sale, delivery or furnishing of heat, cold, power, electricity, water, or light, except when used solely for communications purposes; . . .

220 ILCS 5/3-105 (emphasis added).

Section 8-503

Sec. 8-503 Additions, improvements and new structures; joint construction or other action (in pertinent part) states:

Whenever the Commission, after a hearing, shall find that . . . a new structure or structures is or are necessary and should be erected, to promote the security or convenience of . . . the public or promote the development of an effectively competitive electricity market, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order authorizing or directing that such . . . structure or structures be erected at the location, in the manner and within the time specified in said order; provided, however, that the Commission shall have no authority to order the construction, addition or extension of any electric generating plant unless the public utility requests a certificate for the construction of the plant pursuant to Section 8-406 and in conjunction with such request also requests the entry of an order under this Section. If . . . any new structure or structures, which the Commission has authorized or ordered to be erected, require joint action by 2 or more public utilities, the Commission shall notify the said public utilities that such . . . new structure or structures have been authorized or ordered and that the same shall be made at the joint cost whereupon the said public utilities shall have such reasonable time as the Commission may grant within which to agree upon the apportionment or division of cost of such . . . new structure or structures, which each shall bear. If at the expiration of such time such public utilities shall fail to file with the Commission a statement that an agreement has been made for a division or apportionment of the cost or expense of such . . . new structure or structures, the Commission shall have authority, after further hearing, to make an

order fixing the proportion of such cost or expense to be borne by each public utility and the manner in which the same shall be paid or secured. . .

220 ILCS 5/8-503 (emphasis added).

Section 8-406

Sec. 8-406, Certificate of public convenience and necessity (in pertinent part) states:

(a) No public utility not owning any city or village franchise nor engaged in performing any public service or in furnishing any product or commodity within this State as of July 1, 1921 and not possessing a certificate of public convenience and necessity from the Illinois Commerce Commission, the State Public Utilities Commission or the Public Utilities Commission, at the time this amendatory Act of 1985 goes into effect, shall transact any business in this State until it shall have obtained a certificate from the Commission that public convenience and necessity require the transaction of such business.

(b) No public utility shall begin the construction of any new plant, equipment, property or facility which is not in substitution of any existing plant, equipment, property or facility or any extension or alteration thereof or in addition thereto, unless and until it shall have obtained from the Commission a certificate that public convenience and necessity require such construction. Whenever after a hearing the Commission determines that any new construction or the transaction of any business by a public utility will promote the public convenience and is necessary thereto, it shall have the power to issue certificates of public convenience and necessity. The Commission shall determine that proposed construction will promote the public convenience and necessity only if the utility demonstrates: (1) that the proposed construction is necessary to provide adequate, reliable, and efficient service to its customers and is the least-cost means of satisfying the service needs of its customers or that the proposed construction will promote the development of an effectively competitive electricity market that operates efficiently, is equitable to all customers, and is the least cost means of satisfying those objectives; (2) that the utility is capable of efficiently managing and supervising the construction process and has taken sufficient action to ensure adequate and efficient construction and supervision thereof; and (3) that the utility is capable of financing the proposed construction without significant adverse financial consequences for the utility or its customers. . .

220 ILCS 5/8-406 (emphasis added).

III. Response to Movants

A. The Commission Should Dismiss the Application

The Farm Bureau asserts that the Commission must, as a matter of law, address “a threshold question: Can an entity who desires to be a ‘public utility’ use the expedited review process under Section 8-406.1, which is limited to public utilities?” (Farm Bureau Motion, 3.) Rex Encore asserts that Grain Belt is improperly attempting to leverage Section 8-406.1 to gain authority to act as a utility, and that such authority must first be obtained under Section 8-406(a). (Rex Encore Motion, 1-2.) LACI indicates that, by stating in its Application that it “will be a ‘public utility,’” Grain Belt admits that it is not a public utility, and, therefore, does not meet the statutory definition of “public utility” under Section 3-105. (LACI Motion, 4.) Staff agrees that (1) Section 8-406.1 requires an applicant to be a “public utility” as defined in Section 3-105 of the PUA, (2) Section 8-406.1 does not provide for an applicant to request authority to be a public utility, which must first be obtained under Section 8-406(a), and (3) the Company’s Petition fails to assert or show that it is a public utility as defined in Section 3-105.

Section 3-105 states, in pertinent part, that a “public utility” “owns, controls, operates or manages, within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with, or owns or controls any franchise, license, permit or right to engage” in the transmission of electricity. 220 ILCS 5/3-105. Grain Belt states that it will “own, control, operate and manage, within the State of Illinois, for public use, facilities for the transmission of electricity and therefore will be a ‘public utility’” as defined in Section 3-105. (Application, at ¶¶ 9, 97.)

Grain Belt has not, however, shown or asserted that it is currently a “public utility” as defined in Section 3-105.

A similar question was raised in *Rock Island Clean Line LLC (“Rock Island”)*, Docket no. 12-0560, in which the applicant, Rock Island Clean Line LLC (an affiliate of Grain Belt), requested authorization for a CPCN under Section 8-406(a) to operate as a public utility and under Section 8-406(b) to build a high voltage transmission line. The Commission said, in assessing Section 8-406, that “the PUA allows non-utility applicants to both become public utilities and to subsequently operate, for public use, plant and equipment that transmit electricity.” *Rock Island*, ICC Order Docket No. 12-0560, 26 (Nov. 25, 2014) (pet. for review pending); *Commonwealth Edison v. ICC et al*, Appellate Court Of Illinois, Third Judicial District, Case Nos. 3-15-0099, 3-15-0103 & 3-15-0104.¹ *Rock Island* is distinguishable from the current proceeding because, unlike Section 8-406, Section 8-406.1 contains no provisions under which a non-utility may request and be granted authority to be a public utility; *i.e.*, it contains no equivalent to Section 8-406(a). Grain Belt’s Application contains no request to transact business as a public utility under Section 8-406(a). It contains no cite to provisions or language in Section 8-406.1 that allow Grain Belt to request authority to transact business as a public utility in Illinois, or for the Commission to grant such authority. Nor, despite the absence of any such provisions or language, has Grain Belt explained or supported its assumption that a grant of Section 8-406.1 authority automatically carries with it the equivalent of a Section 8-406(a) authorization to transact business in the state of Illinois

¹ Staff notes that the issue of whether Section 8-406 allows a non-utility to simultaneously request authority under Sections 8-406(a) and (b) is currently on review in the Illinois Appellate Court, Third Judicial District.

as a public utility. Grain Belt has provided no precedent for such an assumption or support for such a departure or interpretation, and Staff is not aware of any such precedent or support to do so. There is certainly no support for the notion that Section 8-406.1 was intended to supersede the Section 8-406(a) CPCN requirement.

In this case, the filing is defective on its face because it requests authority to transact business in this state under a provision that does not provide such authority. As Rex Encore notes, Grain Belt “fails to seek authority under Section 8-406(a) to operate as a utility.” (Rex Encore Motion, 1.) Rex Encore further notes that the Commission analyzes whether an applicant should be a public utility separately from whether a project should be approved under Section 8-406(b) or Section 8-406.1. Id. at 2. Staff agrees that this is a separate determination and believes that a CPCN under Section 8-406(a) is a prerequisite for filing under Section 8-406.1 for authorization for expedited construction of a high voltage electricity line. Given that the authorization under Section 8-406.1 is limited to “construction” of any new high voltage electric service line, the most logical interpretation of Section 8-406.1 is that it is intended to apply to existing public utilities.

The expedited nature of the provision is most likely intended to enable these existing public utilities to quickly build such high voltage electricity lines as may be necessary to meet obligations pursuant to membership in a regional transmission organization. There is no evidence to suggest that the provision was intended to enable entities to negate, ignore or supersede Illinois law in the process, including but not limited to the requirements under Section 8-406(a) that “no public utility shall transact any business in Illinois until it shall have obtained a certificate from the Commission that

public convenience and necessity require the transaction of such business.” 220 ILCS 5/8-406(a). Such authorization for the “transaction of such business,” as requested by Grain Belt in its Application is simply not available under the plain language of Section 8-406.1 which, if met, would only authorize “construction.”

Moreover, the Application also requests authorization to “operate and maintain” under a provision that does not contemplate such authorization. As explained above, Section 8.406.1 authorization is limited to “construction.” The request to operate and maintain is more properly brought under Section 8-406. As such, the Application is defective on its face and should be dismissed.

B. Fast Track to Eminent Domain Not Appropriate Here

The Farm Bureau points out that if the Commission grants a certificate under the expedited review process of Section 8-406.1, then Section 8-406.1(i) requires this Commission to also include an order under Section 8-503 of the PUA authorizing or directing the construction of the high voltage transmission line. (Farm Bureau Motion, 5.)

Section 8-503 of the PUA states, in pertinent part, that:

Whenever the Commission, after a hearing, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility or of any 2 or more public utilities are necessary and ought reasonably to be made or that a new structure or structures is or are necessary and should be erected, to promote the security or convenience of its employees or the public or promote the development of an effectively competitive electricity market, or in any other way to secure adequate service or facilities, the Commission shall make and serve an order authorizing or directing that such additions, extensions, repairs, improvements or changes be made, or such structure or structures be erected at the location, in the manner and within the time specified in said order; ...

220 ILCS 5/8-503.

The automatic grant of a Section 8-503 order under the Section 8-406.1 process is significant because, by the express terms of Section 8-509 of the PUA, an order under Section 8-503 is a prerequisite to obtaining authority to use eminent domain to acquire property rights under Section 8-509. Section 8-406.1 becomes essentially a fast track to eminent domain authorization.

It is still not clear whether the Company has met the requirements of a Section 8-503 order. While Grain Belt has not requested authority pursuant to Section 8-509 of the PUA to acquire land and land rights through eminent domain in its Application here, it is entirely possible that it could seek such authority going forward. (See Application, ¶76.) Indeed, while the Company said that it would not pursue that option unless it is unsuccessful in obtaining all land and rights-of-way needed after making reasonable efforts to acquire the land rights through negotiations and voluntary transactions, it did not commit to rule out that option. Id.

Since it is unclear at this time that there would be a basis to issue an expedited CPCN, and given the enormity of the project itself, there is less of a justification to take the extraordinary step of ordering the Project's construction under Section 8-503 that would be inherent within the Section 8-406.1 approach. Staff recommends, therefore, that the Commission dismiss this Application without prejudice.

C. Dismissal Without Prejudice is Warranted; Company has an Alternative.

Staff agrees that a dismissal without prejudice is warranted given the Company's lack of eligibility to file under Section 8-406.1, as well as other deficiencies in the Company's application. Furthermore, there is a more appropriate alternative through which the Company may seek authorization to transact business as a public utility and

to construct its proposed transmission line; Grain Belt may file applications under Section 8-406. Unlike the current Application filed pursuant to Section 8-406.1, in an Application pursuant to Section 8-406 the Applicant may explain whether and how it would meet the Section 3-105 definition of a “public utility.” It would also enable the Commission to address Grain Belt’s request to transact business in the state of Illinois as a public utility and would enable stakeholders to have an opportunity to be heard on the merits of those issues. In addition, a proceeding initiated under Section 8-406 would enable the Applicant to explain whether and how the proposed transmission project would serve the public convenience and necessity and otherwise satisfy the Act’s certification standards.

D. Oral Argument is Unnecessary and Should be Denied

CCPO requests an oral argument before the full Commission. (CCPO Motion, 6.) Staff believes that oral argument is not required or necessary and would not be an effective use of the Commission’s resources. First, on the issue of jurisdiction, it is clear that the Commission has jurisdiction over requests for CPCN’s made pursuant to Sections 8.406 and 8-406.1 of the PUA regardless of the applicant’s status as a public utility. The Commission is fully within its authorization by the General Assembly to assess whether an applicant under both or either sections has properly filed and/or met any and all other requirements under the PUA. Second, it is not necessary for this Commission to make a determination of whether Grain Belt is or is not a ‘public utility’ as defined by Section 3-105 at this time as the filing is defective on its face for other reasons as demonstrated above, and, therefore, should be dismissed without prejudice. In any event, whether or not Grain Belt meets the definition of a “public utility” as

defined by Section 3-105, it is clear that Grain Belt has not received a certificate to operate as a public utility in the State and, therefore, Grain Belt is ineligible to submit Section 8-406.1 applications.

Finally, the current calendar under which the Commission must operate in this expedited docket has a limited and condensed statutory timeframe for the Commission to act. The matter has been sufficiently vetted in these pleadings, and further delay on the matter would be inefficient and disruptive. As such, Staff recommends that the request for oral argument in this matter be denied and the Application be dismissed without prejudice as discussed above.

IV. CONCLUSION

WHEREFORE, for the reasons stated above, Staff respectfully requests that the CCPO request for oral argument be denied and the Grain Belt Application be dismissed without prejudice. Staff further requests any and all other appropriate relief.

Respectfully submitted,

/s/

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